

Disposition of the Independent Review Panel



Complainant: Rafael Gonzalez-Cortes

IRP Case: 2003.252

Date: December 22, 2005

MDPD Case: IA 2003-0249

The Independent Review Panel met on December 22, 2005 for the purpose of publicly reviewing the complaint made by Rafael Gonzalez-Cortes against the Miami-Dade Police Department and the department's response to that complaint. The following represents the findings of the Panel:

A. Recommendations

1. That MDPD counsel Officer Mark Smith regarding inappropriate arrest charges.
2. That MDPD revise Legal Bulletin 95-4, Roadside Vendors, to either provide legal support for the statement that "Vendors and peddlers must remain mobile and may only legally stop to serve a customer at the customer's request," or eliminate the statement.

B. Incident

Mr. Gonzalez Cortes is a flower vendor. He alleges that Miami-Dade Police Officer Mark Smith harassed him by arresting him for Doing Business without a License, when in fact he had a valid Occupational License.

C. Allegations

Mr. Gonzalez Cortes alleged that Officer Mark Smith:

1. Inappropriately arrested him more than one time for Doing Business without a License (County Code Sec.8A-172).
2. Harassed him by arresting him 3 times in 12 days (8/7/03, 8/15/03, 8/19/03), even though Mr. Gonzalez Cortes showed him a valid license.

D. Disposition of the Independent Review Panel

The Panel found the allegations to be "**Sustained**" based on the following:

1. Officer Smith admitted five times that he charged Mr. Gonzalez Cortes with conducting business without a license after having seen his Occupational License.
2. The Criminal Justice Information System documents that Mr. Gonzalez Cortes was arrested six times between 6/13/02 and 8/19/03, and each time charged with Doing Business without a License. The dispositions of all charges were "nolle pros."
3. Occupational License Records confirm that Mr. Gonzalez had a valid Occupation License from 6/6/03 - 9/30/03.

E. Other Findings

1. The Panel found no legal basis for the statement in MDPD Legal Bulletin 95-4, Roadside Vendors, that: “Vendors and peddlers must remain mobile and may only legally stop to serve a customer at the customer’s request.”
2. The MDPD Disposition finding of NOT SUSTAINED for the allegation that Officer Mark Smith arrested Mr. Gonzalez Cortes six times for doing business without a license, even though he had a valid peddler’s license, is not based on fact.
 - Officer Smith admitted five times that he charged Mr. Gonzalez Cortes with conducting business without a license after having seen his Occupational License.
 - The MDPD disposition finding that “the complainant was arrested (PTA) because he was not remaining mobile as required by the Florida State Statute” attempts to justify Officer Mark Smith’s repeated improper actions in charging Mr. Gonzalez with conducting business without a license.
3. If Officer Smith intended to arrest Mr. Gonzalez Cortes “because he was not remaining mobile as required by the Florida State Statute,” Officer Smith should have charged him with a violation of Florida State Statute 316.2045, which makes it “unlawful for any person or persons willfully to obstruct the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic...”
4. A serious procedural violation regarding missing Arrest Affidavits was documented in the Internal Affairs report, but not addressed by the MDPD disposition panel.

The Independent Review Panel concluded the complaint on December 22, 2005.

Independent Review Panel

Committee Recommendation to the Panel

September 22, 2005¹
October 27, 2005

Complaint: A 2003.252

MDPD Case: IA 2003-0249

Complainant: Rafael Gonzalez Cortes²

Accused Party: Miami-Dade Police Department (MDPD), Officer Mark Smith

Date Complaint Received: August 12, 2003

Materials Reviewed: Correspondence, IA Case File, staff notes, committee notes, relevant Count Ordinances and State Statutes; MDPD Legal Bulletin 95-4

Committee: Julia Dawson, Esq., Panel Member; Dr. Eduardo Diaz, Executive Director; Carol Boersma, Executive Assistant to the Director; Linda Pierre, Conflict Resolution Specialist

Meeting Date: February 3, 2005 Present: Sergeant Darrell Rasmussen

Complaint: Mr. Gonzalez Cortes is a flower vendor. He alleges that Miami-Dade Police Officer Mark Smith has been harassing him by arresting him for Doing Business without a License, when in fact he has a valid Occupational License, category 220 Peddler. Mr. Gonzalez Cortes states that when he shows his license to Officer Smith, the officer tells him the license is no good. When he shows his license to other MDPD officers, he is left alone. Officer Smith has also arrested his wife.

The Criminal Justice Information System documents seven arrests between 6/13/02 and 8/19/03, six for "Business w/o License," and one for Failure to have a "Certificate of Use and Occupancy." Charges were filed on 6/13/02, 6/18/02, 10/18/02, 10/18/02 (two different case numbers on 10/18/02), 8/7/03, 8/15/03 and 8/19/03. The Occupational License Division documents that Rafael Gonzalez Cortes has had a valid license since 6/6/02. The dispositions of all charges were "nolle pros."

Mr. Gonzalez Cortes alleges that Officer Mark Smith:

1. Inappropriately arrested him more than one time for Doing Business without a License (County Code Sec.8A-172).
2. Harassed him by arresting him 3 times in 12 days (8/7/03, 8/15/03, 8/19/03), even though Mr. Gonzalez Cortes showed him a valid license.

¹ The Panel deferred review of the complaint so the MDPD complaint investigator, Sgt. Darrel Rasmussen could be present.

² The spelling and sequence of the names vary: Arrest record: Cortez, Rafael Gonzalez; Occupational License: Gonzalez Cortes, Rafael

Department Response – IA Investigation 2003-0249: MDPD investigated the allegation that Officer Smith arrested Rafael Gonzalez Cortes six times between June 8 and October 8, 2002³, for doing business without a license, even though he had a valid peddler's license. The MDPD Disposition Panel found the allegation to be NOT SUSTAINED. The following is excerpted from the disposition:

In his statement, Officer Smith acknowledged the valid peddler's license; however, the complainant was arrested (PTA⁴) because he was not remaining mobile as required by the Florida State Statute. The complainant stated he kept moving while he sold flowers.

There are no independent witnesses to either corroborate or dispute the allegation... there is insufficient evidence to prove or disprove the charge.

Statement of Officer Smith: When asked what made him determine that Mr. Cortes did not have a license or what was his reason for [arresting] him, Officer Smith responded:

...even when they have a license, when they are set up at a street corner for numerous hours at a time with numerous pots and it's a permanent establishment, you have to remain mobile all the time like the ice cream truck.

Additional Information: Sgt. Rasmussen attempted to locate Mr. Cortez-Gonzalez's six PTA's at the MDPD records Bureau and at the Kendall Station. The reports are not on file and could not be located.

Committee Remarks: Ms. Boersma advised that the complainant was not present because she has been unable to locate him. Apparently he has moved. He did not renew his Occupational License when it expired in 2003.

MDPD Legal Bulletin 95-4 "Roadside Vendors"

Ms. Dawson focused on the requirement in the bulletin that "vendors and peddlers must remain mobile and may only legally stop to serve a customer at the customer's request. The acquisition of a peddler's license does not entitle the vendor/peddler to violate the requirement that they must remain mobile."

The bulletin cites Sec. 8A-172, Doing business without license, which is quoted verbatim:

Any person who shall carry on or conduct any business or profession for which a license is required without first obtaining such license shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than double the amount required for such license or imprisonment not exceeding six (6) months.

³ The correct dates are 6/18/02 and 8/19/03.

⁴ Promise To Appear

The bulletin also cites Florida Statute 316.2045 which reads as follows:

(1) It is unlawful for any person or persons willfully to obstruct the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of vehicles or pedestrians traveling thereon; and any person or persons who violate the provisions of this subsection, upon conviction, shall be cited for a pedestrian violation, punishable as provided in chapter 318.

The Loss of Six “PTAs” (Promise to Appear Arrest Affidavits)

Sergeant Rasmussen was unable to locate the paper copies of the six Arrest Affidavits (PTAs) for doing business without a license, either at the Records Bureau or at the Kendall Station. Sergeant Rasmussen stated he could not find either the police copies or the court copies. The missing reports are documented in the Internal Affairs report; however the MDPD disposition panel did not address their absence.

Officer Smith’s statement.

1. Office Smith admits five times that he charged Mr. Gonzalez Cortes with conducting business without a license after having seen his Occupational License.

- a. Worksheet dated 10/5/02

Q: What was the charge you charged him with that day?

A: Conducting business without a license.

Q: Do you recall if he showed you his license on that day?

A: ...Yes, sir, he did.

Q: And again, you were writing him this citation for what charge?

A: Conducting business without a license which is 8A-172.

- b. Worksheet dated 10/8/02

Q: Does that worksheet have a notation about the arrest of Mr. Cortez?

A: Yes, sir, it does.

Q: And the statute for that?

A: That’s 8A-172.

Q: Is this the same violation that you already charged him with on the previous dates?

A: Yes.

c. Worksheet dated 7/29/03

Q: Do you recall what you charged him for that day?

A: 8A-172, conducting business without a license.

d. Worksheet dated 8/9/03

Q: Does it have a notation of a Rafael Cortez being arrested that day?

A: Yes, it does, sir.

Q: And the statute for that?

A: Conducting business without a license 8A-172.

e. Worksheet dated 8/16/03

Q: Is Mr. Cortez's information on the bottom of your worksheet?

A: Yes, sir.

Q: Was it the same charge that day?

A: Yes, sir, it was.

2. Officer Smith's justification for arresting peddlers:

"They are in violation of their license [if] they're not remaining mobile like the ice cream truck.... Because they're not complying with the full basis of the license by remaining mobile and doing what they're supposed to do, it puts their license in violation...by not complying with what they're supposed to be doing."

3. Officer Smith's justification for arresting Mr. Gonzales Cortes

Q: In each of these six [arrests], did Mr. Cortez ever make any attempt... to be mobile?

A: No, sir. He would always remain stationary...

Q: And in your mind, this violates that law that you explained earlier?

A: Yes, sir.

Q: As far as you know, between the dates of June 8th and August 16, Mr. Cortez had a valid peddler's license; is that correct?

A: That's correct.

Q: However, you felt that he did not comply with the rules of that license?

A: That's correct, sir.

Q: And is that why you [arrested] him...?

A: Yes, sir.

4. Officer Smith stated he had never been issued a mandatory subpoena to go with any of the cases against the complainant, only "standby" subpoenas.

Staff Remarks

IRP staff person Carol Boersma met with Captain Miguel Hernandez in MDPD Court Services Bureau. Captain Hernandez explained the following regarding subpoenas:

When a person is arrested, a copy of the Arrest Affidavit goes to the State Attorney's Office (SAO). The SAO reviews the Arrest Affidavit and determines whether or not to file charges or what charges to file. When charges are filed, the SAO issues subpoenas to the involved officers.

If the SAO nolle prossed⁵ a case, there probably was no subpoena issued to the arresting officer. Captain Hernandez checked the records for each of the six arrests made by Officer Mark Smith for failure to have a peddlers license. There is no record of a subpoena being issued to Officer Smith for any case.

Committee Findings:

A. Regarding the allegations

1. The committee found the allegation that Officer Mark Smith inappropriately arrested Rafael Gonzalez Cortes more than one time for Doing Business without a License to be **SUSTAINED**, based on the following:
 - Officer Smith admitted five times that he charged Mr. Gonzalez Cortes with conducting business without a license after having seen his Occupational License.
 - The Criminal Justice Information System documents that Mr. Gonzalez Cortes was arrested six times between 6/13/02 and 8/19/03, and each time charged with Doing Business without a License.
 - Occupational License Records confirm that Mr. Gonzalez had a valid Occupation License from 6/6/03 - 9/30/03.
2. The committee found the allegation that Officer Mark Smith harassed Mr. Gonzalez Cortes by arresting him 3 times in 12 days (8/7/03, 8/15/03, 8/19/03), even though Mr. Gonzalez Cortes showed him a valid license to be **SUSTAINED**.

B. Other Findings:

1. The MDPD Disposition finding of NOT SUSTAINED for the allegation that Officer Mark Smith arrested Mr. Gonzalez Cortes six times for doing business without a license, even though he had a valid peddler's license, is not based on fact.

⁵ *Nolle Prossed* Latin term meaning "unwilling to prosecute." The State Attorney's Office did not pursue the charges.

- Officer Smith admitted five times that he charged Mr. Gonzalez Cortes with conducting business without a license after having seen his Occupational License.
 - The MDPD disposition finding that “the complainant was arrested (PTA) because he was not remaining mobile as required by the Florida State Statute” attempts to justify Officer Mark Smith’s repeated improper actions in charging Mr. Gonzalez with conducting business without a license.
2. If Officer Smith intended to arrest Mr. Gonzalez Cortes “because he was not remaining mobile as required by the Florida State Statute,” Officer Smith should have charged him with a violation of Florida State Statute 316.2045, which makes it “unlawful for any person or persons willfully to obstruct the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic...”
 3. A serious procedural violation regarding missing Arrest Affidavits was documented in the Internal Affairs report, but not addressed by the MDPD disposition panel.

Recommendations: The committee recommends that

1. The Panel adopt the committee findings and conclude the complaint, and
2. MDPD counsel Officer Mark Smith regarding his inappropriate arrest charges.